UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SAN FRANCISCO DIVISION OF JUDGES

GOOD SAMARITAN HOSPITAL

and **Case 31-CA-117462**

CALIFORNIA NURSES ASSOCIATION

Amanda W. Dixon, Esq. for the General Counsel.
Marta M. Fernandez, Esq. and
Barbra A. Arnold, Esq. for the Respondent.
Pamela Allen, Esq. and
Carmen Comsti, Esq. for the Charging Party.

DECISION

STATEMENT OF THE CASE

MARY MILLER CRACRAFT, Administrative Law Judge. This case involves whether it is appropriate to defer to the decision of an arbitrator under the standards set forth in *Olin Corp.,* 268 NLRB 573 (1984). The amended complaint alleges at paragraph 7 that since November 13, 2013, Good Samaritan Hospital (Respondent) has been transferring work formerly performed by unit employees (charge nurses) to non-bargaining unit employees (department supervisors) without affording the California Nurses Association (CNA)[1] notice and an opportunity to bargain. Paragraph 8 alleges that since November 13, 2013, Respondent has failed to continue in effect the terms of its 2012-2015 contract by transferring work formerly performed by charge nurses to department supervisors. Both actions are alleged to violate Section 8(a)(5) and (1) of the Act.

[1] CNA filed the original and four amended unfair labor practice charges on November 21, 2013; December 16, 2013; January 28, 2014; January 31, 2014; and April 8, 2015. The amended complaint issued on June 26, 2015.

The parties submitted this case pursuant to Respondent's motion to defer to arbitration with supporting brief. The General Counsel and CNA filed opposition briefs. On the entire record, and after considering the parties' statements of position and the briefs filed by counsel for the General Counsel, counsel for CNA, and counsel for the Respondent, the following findings of fact and conclusions of law are made.

JURISDICTION

Respondent is a California corporation engaged in the operation of an acute care hospital in Los Angeles, California. In conducting its business operations, Respondent annually purchases and receives goods valued in excess of $50,000 directly from points located outside the State of California. Respondent admits, and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and is a health care institution within the meaning of Section 2(14) of the Act. Respondent admits and I find that CNA is a labor organization within the meaning of Section 2(5) of the Act. Accordingly, this dispute affects interstate commerce and the Board has jurisdiction of this case pursuant to Section 10(a) of the Act.

COLLECTIVE-BARGAINING RELATIONSHIP

Since January 7, 1999, Respondent has recognized Charging Party CNA as the certified collective-bargaining representative of its "full-time, regular part-time, non-benefitted full-time and per diem registered nurses, including charge nurses." Supervisors and other personnel are excluded from the bargaining unit. The parties entered into their current collective-bargaining agreement on November 12, 2012 and it remained in effect through November 11, 2015. Article I – Recognition sets forth the description of the bargaining unit. This unit is appropriate within the meaning of Sec. 9(b) of the Act and CNA has been the exclusive representative of unit employees within the meaning of Sec. 9(a) of the Act.

DEFERRAL TO ARBITRATION

On December 3, 2013, CNA filed its second step[2] written grievance claiming that Respondent violated multiple provisions of the parties' 2012-2015 contract when it issued layoff notices for 52 charge nurses, coupled with a notice of intent to remove the charge nurse position from the bargaining unit and have their work performed by its supervisors. The grievance stated,

> **Nature of Grievance**: Employer violated multiple provisions of collective bargaining agreement when it issued layoff notice for 52 charge nurses, coupled with notice of intent to remove charge nurse job from bargaining unit and have charge nurse work performed by supervisors.
> **Violation(s) of Article**: Articles 1, 2, 3, 6, 7, 9, 12 and 26.

[2] Step 1 of the grievance procedure is presented orally to the nurse's immediate supervisor. If not resolved, it goes directly to Step 2, which must be presented in writing.

The parties presented their arbitration case to John Kagel, Arbitrator, on June 25-27 and September 17-18, 2014. The basic disagreement was whether the event announced on November 13, 2013, was a "layoff" or a "restructuring." The specific issues presented to the arbitrator were, from CNA's perspective, "[W]hether the Employer has violated the Collective Bargaining Agreement by the elimination of position of 52 Charge Nurses on or about November 13, 2013," and from Respondent's view point, "[W]hether the grievance is substantively arbitrable, and . . . [whether the grievance] should be denied." The issue section further stated, "A complaint claiming violation of the National Labor Relations Act is not presented in this matter."

The evidence at the arbitration hearing established that on November 13, 2013, Respondent sent CNA a notice of its intent to eliminate the jobs of 52 Charge Nurses by December 15;[3] that is, its intent to eliminate 100 percent of the Charge Nurse positions. The stated purpose of elimination of the Charge Nurse positions was to better meet accountability requirements and enhance the patient experience. According to Respondent, it offered at this time and on other subsequent occasions, to bargain with CNA over the effects of the restructuring but the Union did not take up this offer.

On that same date, all hospital staff were similarly informed of the elimination of Charge Nurse positions. Additionally, all staff were further informed that a new non-bargaining unit position, Department Supervisor, would be established. Finally, all staff were informed that Charge Nurses would remain in their current positions while the hospital and the union bargain the effects of this change. The unfair labor practice charge and amended charges as well as the initial complaint issued May 29 2014 were submitted in evidence before the arbitrator.

In its brief to the arbitrator, CNA asserted that elimination of the Charge Nurse position created safety concerns and violated the plain language of Article 6, specifically, "A layoff shall be defined as the permanent termination of the employment of one or more Registered Nurse due to a reduction in force." Another portion of Article 6 was also cited for the order of layoff by inverse seniority. CNA's position was that Respondent's action in eliminating the Charge Nurses was a layoff and Respondent failed to utilize inverse bargaining unit seniority to effectuate the layoff. CNA cited past practice in the "old oncology unit" at 5 South, which was closed in 2012. Bargaining unit seniority was utilized for that layoff. CNA's post-hearing brief did not list the grievance issue of transfer of unit work to non-bargaining unit personnel and the brief did not analyze whether transfer of unit work violated the contract. Further, the brief did not rely on the management rights provision which states that the Employer and the Union agree, upon request, to bargain in good faith about the utilization of employees not covered by the contract to perform work which is currently performed by nurses in the bargaining unit.

Respondent relied upon its management rights clause which it contended allowed elimination of job classifications in existence. Further Respondent claimed that no "layoff" had occurred because none of the Charge Nurses were permanently terminated due to a reduction in force. In fact, according to the evidence at the arbitration hearing, six Charge Nurses voluntarily retired; eight were hired as Department Supervisors; four bumped into bedside positions as meal and rest break relief nurses; four took coordinator positions, and thirty bumped into regular

[3] Based upon evidence at the arbitration, it appears that the parties agreed that the change was delayed until the beginning of March 2015.

bedside nursing jobs. Respondent also relied on a prior layoff in 2012 in connection with consolidation of units 5 North and 5 South. There, according to Respondent, it was clear from the outset that layoffs would be involved.

After all of this evidence was heard by the arbitrator, but before the arbitrator's award issued, the Region, on November 14, 2014, deferred to the parties' grievance/arbitration procedures.

On January 15, 2015, arbitrator Kagel found in favor of Respondent. The arbitrator noted that separate NLRA charges were not before him stating, "Hence, issues concerning decisional and effects bargaining obligations are not relevant in this proceeding." The grievance framed the situation as a layoff and the arbitrator found that there was no layoff as the number of unit jobs before and after November 13 was essentially comparable. This was due to creation of 32 Break Relief positions plus voluntary retirement of some Charge Nurses and some taking Department Supervisor positions, Staff nurse positions, or break relief positions. The arbitrator found no permanent termination of employment occurred.

According to the recitation of facts, the arbitrator found that Respondent created a non-bargaining unit position of supervisor of department nursing shift including patient relations:

> A new, non-bargaining unit position of Department Supervisor was created. Those duties included overall supervision of a department's nursing shift, including patient relations. According to the Employer, the Department Supervisors, all of whom hold RN licenses, do not personally provide clinical patient care but are not precluded from assisting in direct patient nursing care in emergencies. Such emergency nursing work is not an Agreement violation if performed by qualified non-bargaining unit personnel.

The arbitrator found that no bargaining unit personnel lost their jobs as a result of the "restructuring." Those who had been Charge Nurses could

- apply for a Department Supervisor position,
- opt to take a Staff Nurse bedside position,
- retire with severance, some with an enhancement for health care costs,
- become Case Coordinators, or
- become Break Relief Nurses.

The arbitrator found that elimination of the 52 Charge Nurse positions, in essence, failure to fill the unit position of Charge Nurse, was allowed by the contract's management rights provision, Article 3.19 of the contract.[4] Thus, he reasoned, the position of Charge Nurse did not disappear from the contract even though the jobs were not filled. The arbitrator further stated with regard to transfer of unit work to non-unit personnel, "The added Supervisors perform no Bargaining Unit work with respect to taking patient assignments, except they are specifically authorized, and required, to assist in emergencies, as a Union witness recognized."

[4] Article 3.19 states that Respondent "has the right to operate its business which includes the exclusive right to determine, change, discontinue, alter, or modify in whole or in part, temporarily or permanently, 19. The job classifications, shift schedules and content and qualifications thereof."

By email on April 2, 2015, Region 31 notified the parties that it had decided to revoke deferral to arbitration. On April 7, 2015, CNA filed a fourth amended charge adding an allegation that Respondent transferred work formerly performed by unit employee charge nurses to non-unit employee supervisors thereby modifying the parties' contract. By letter of April 17, 2015, Region 31 stated that because the contractual issues presented to the arbitrator were not factually parallel to the statutory proceedings and because the award was repugnant to the Act, it would not defer to the arbitrator's award. Although Respondent sought further elucidation, the Region denied the request for further rationale.

All parties agree that the Board's holding in *Babcock & Wilcox Construction Co.,* 361 NLRB No. 132 (2014), does not apply to this proceeding.[5] Respondent asserts that the arbitration award meets the Board's standards for deferral while the General Counsel and CNA claim that it does not meet those standarrds.

As set forth in *Spielberg Mfg. Co.,* 112 NLRB 1080, 1082 (1955), the Board will defer, as a matter of discretion, in cases where the arbitral proceedings appear to have been fair and regular, all parties agreed to be bound, and the arbitrator's decision is not clearly repugnant to the Act. In *Raytheon Co.,* 140 NLRB 883, 884-885 (1963), enf. denied, 326 F.2d 471 (1st Cir. 1964), the Board added the requirement that the arbitrator must have considered the unfair labor practice issue. As interpreted in *Olin Corp.,* 268 NLRB 573 (1984), this requirement is satisfied if the contractual and statutory issues were factually parallel and the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice. Regarding repugnancy to the Act, *Olin* stated:

> And, with regard to the inquiry into the "clearly repugnant" standard, we would not require an arbitrator's award to be totally consistent with Board precedent. Unless the award is "palpably wrong," [footnote omitted] i.e., unless the arbitrator's decision is not susceptible to an interpretation consistent with the Act, we will defer.

Id. at 574. *Olin* also placed the burden on the party opposing deferral to show that the deferral criteria were not met. Id.

Here, the arbitration proceedings were fair and regular. Indeed, there is no dispute on this score. All parties were afforded notice of the proceeding, appeared at the arbitration hearing, and were given the opportunity to present witnesses, cross-examine witnesses, introduce documentary exhibits, and fully brief their positions to the arbitrator. Due process was thus provided to all participants. Further, there is no dispute that pursuant to the terms of the 2012-2015 contract, all parties agreed to be bound.[6]

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[5] *Babcock* applies in cases where the allegations claim a violation of 8(a)(1) and (3). This case does not allege such violations. Moreover, as Respondent points out, *Babcock* is applied prospectively only and therefore does not apply to cases such as this one which was pending at the time of the decision. (Slip op. at 13-14). Here the first unfair labor practice charge was filed on November 19, 2013. *Babcock* issued on December 14, 2014. In any event, all parties agree that *Babcock* does not apply here.

[6] Article 5 – Grievance Procedure, C. Arbitration Procedure, 3."The arbitrator's decision shall be final

Thus, the decision to defer turns on (1) whether the contractual and statutory issues were factually parallel, (2) whether the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice and, if so (3) whether the General Counsel has shown that the arbitrator's decision is not susceptible to an interpretation consistent with the Act.

Are the contractual and statutory issues factually parallel?

Looking at the issues from a factual basis, it must be concluded that the arbitral and statutory issues are factually parallel. Central to both cases is the elimination of 52 Charge Nurse positions. The factual analysis of the arbitrator considered the announcement, the parties' contract, the communications between the parties, including offers to engage in effects bargaining, and the effects of the layoff/restructuring, and the job duties, descriptions, and testimony of the Charge Nurses and the Department Supervisors. These same facts are the central facts in the unfair labor practice. The arbitrator found that the management's rights clause of the parties' contract allowed Respondent to eliminate the 52 Charge Nurses, thus, in effect, determining the statutory issue of notice and opportunity to bargain:[7]

> The Union maintains that, nonetheless, the elimination of Charge Nurses was a permanent termination of their employment as Charge Nurses. The Union confirmed that Charge Nurse is a job classification under the Agreement, distinct from Staff Nurse. As the Employer contends, whether or not a management rights clause provides that, an Employer does not have to assign personnel to fill a job classification; there is no requirement that an Employer maintain personnel in one even if it is listed in a collective bargaining agreement. And, here, Article 3.19 specifically reserved the right to determine what the occupancy of a job classification would be would be up to the Employer.

The arbitrator further fully considered the issue of transfer of bargaining unit work to supervisors and found that the Department Supervisors perform no bargaining unit work, thus, in effect determining the contractual and statutory issue of breach of contract.[8]

> A new, non-bargaining unit position of Department Supervisor was created. Those duties included overall supervision of a department's nursing shift, including patient relations. According to the Employer, the Department Supervisors, all of whom hold RN licenses, do not personally provide clinical patient care. . . .
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> The added Supervisors perform no Bargaining Unit work with respect to taking patient assignments, except they are specifically authorized, and required to assist in emergencies, as a Union witness recognized.

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and binding on the parties."

[7] Arbitrator's Decision at page 14 [reference omitted].

[8] Arbitrator's Decision at 2, 17 [reference omitted].

These findings resolve the unfair labor practice allegation that Respondent transferred unit work to non-unit, supervisory employees without bargaining.[9]

Indeed, in alleged Section 8(a)(5) cases in which the issue is whether the employer has a contractual right to take the contested action, any violation of the Act may turn entirely on contract interpretation while in Section 8(a)(1) and (3) cases which require interpretation of the Act, contract interpretation expertise is not typically required. Thus, the Board has recognized that matters of contract interpretation can best be resolved by arbitrators with special skill and experience in deciding matters arising under established bargaining relationships than by application of a particular provision of the Act.[10] To the extent that CNA argues that this case does not turn on contractual interpretation, I reject this argument. The arbitrator specifically considered the parties' contract in making his finding.

General Counsel's and CNA's further focus is on the arbitrator's failure to adequately consider the unfair labor practice issues. In this regard, the arbitrator stated that the unfair labor practice issues were not before him and that issues of decision and effects bargaining were irrelevant. *Olin*, however, does not require explicit arbitral consideration of the statutory issue or the applicable legal standards in order to exercise deferral to arbitration.[11] In fact, the Board stated in *Olin* that any problems of comparison of the contractual and statutory legal standards would be examined in the "clearly repugnant" analysis. *Olin,* supra, 268 NLRB at 574 (In this respect, differences, if any, between the contractual and statutory standards of review should be weighed by the Board as part of its determination under the *Spielberg* standards of whether an award is "clearly repugnant" to the Act.)

However, *Olin* does require that the issues be factually parallel. For instance, in *Olin,* the arbitral issues were whether the grievant caused, participated in or failed to attempt to stop the sick out as required by Article XIV (no union officer will cause or permit its members to cause any strike, slowdown or stoppage of work, directly or indirectly, with the full operation of the plant). The Board found that even though the legal issues were different, the factual question was coextensive with those the Board would consider on the statutory question of whether the parties' contract clearly and unmistakably proscribed the grievant's behavior. Here the statutory issues revolve, in part, and were determine in whole by analysis of the contract management rights clause. Thus, I reject the General Counsel's and CNA's arguments and find that the contractual and statutory issues are factually parallel.

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[9] CNA argues that this finding cannot be relied on as dispositive because the arbitrator did not make a specific finding regarding whether Charge Nurses performed bargaining unit work with respect to taking patient assignments prior to being eliminated. I find that such a determination is inherent in the arbitrator's finding.

[10] *Collyer Insulated Wire,* 192 NLRB 837, 839 (1971).

[11] See also, *Reichhold Chemicals,* 275 NLRB 1414, 1416 (1985) (where statutory and contractual issues turn on the same finding and same evidence, the issues are factually parallel); *Badger Meter*, 272 NLRB 824, 826(1984) (contractual and statutory issues turned on presence or absence of contractual authorization for employer's changes thus contractual and statutory issues factually parallel); and *Bay Shipbuilding Corp.,* 251 NLRB 809, 810 (1980) (Although the arbitrator specifically declined to decide whether the employer violated Sec. 8(a)(5), "he made factual findings, in the course of resolving the contractual issue, which resolve the unfair labor practice issues. This is all that is necessary for deferral.")

Was the arbitrator presented generally with the facts relevant to resolving the unfair labor practice?

Respondent and the General Counsel agree that the evidence presented to the arbitrator is generally the same evidence necessary for determination of the unfair labor practice issues.[12] In fact, Respondent asserts that the General Counsel's subpoena duces tecum listed the same documents.

Evidence relevant to the unfair labor practice issues potentially includes the parties' contract, Respondent's written and verbal communications to and from CNA regarding elimination of 52 Charge Nurse positions, written and verbal communications between the parties regarding any opportunities to bargain prior to implementation, comparative duty descriptions of the various positions at issue, and actions taken by Respondent to implement its announcement. The arbitrator accepted such evidence at the hearing and considered it in his decision.

Thus, the evidence presented to the arbitrator included the parties' collective-bargaining agreement, Respondent's November 13, 2014 announcement to CNA, Respondent's November 13, 2014 announcement to all staff including the bargaining unit, communications between Respondent and CNA and Respondent and unit employees regarding elimination of 52 Charge Nurse positions and implementation of the elimination, and job descriptions. Accordingly, I find that the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice allegations.

Has the General Counsel shown that the arbitrator's decision is not susceptible to an interpretation consistent with the Act?

As stated above, *Olin* does not require the arbitrator's award to be totally consistent with Board law. The Board stated it would defer unless the arbitrator's decision is "palpably wrong," that is, the decision is not susceptible to an interpretation consistent with the Act. The test for repugnancy is not whether the Board would have reached the same result as the arbitrator but whether the arbitrator's decision was palpably wrong as a matter of law. *Inland Steel Co.,* 263 NLRB 1091 (1982). Further, as Respondent notes, the arbitrator's award need not be totally consistent with Board precedent, citing *Martin Redi-Mix,* 274 NLRB 559, 559 (1985).

The General Counsel and CNA argue that the arbitrator's decision is not susceptible to an interpretation consistent with the Act because he did not expressly find or discuss whether Respondent had the right to unilaterally transfer bargaining unit work outside the unit. In this respect, the General Counsel and CNA assert that the arbitrator's decision specifically violates a management's right provision which was not discussed at the arbitration, in post-arbitration briefs, or in the arbitrator's decision. This provision states, "

[12] To the extent that CNA argues that the arbitrator did not consider comparative duties of Department Supervisor and Charge Nurse, I reject the argument as the evidence before the arbitrator included the job duties and testimony regarding those job duties.

> During the term of this Agreement, the Union and the Employer agree, upon request, to bargain in good faith about . . . 2. The utilization of employees not covered by this Agreement to do work which is currently done by Nurses covered by this Agreement. . . .

Of course, this provision is more or less a restatement of the law. See, e.g., *Regal Cinemas, Inc.*, 334 NLRB 304, 304 (2001), enfd. 317 F.3d 300 (D.C. Cir. 2003) (reclassification or transfer of bargaining unit work to managers or supervisors is a mandatory subject of bargaining where it has an impact on unit work. *Land O'Lakes, Inc.*, 299 NLRB 982, 986–987 (1990); *Hampton House*, 317 NLRB 1005 (1995)). Assuming that CNA requested bargaining and assuming an impact on unit work, Respondent would ordinarily be required to bargain about the decision and effects of a transfer of unit work to non-unit employees. However, because the arbitrator found there was no transfer of Charge Nurse duties to Department Supervisors, the presence of this provision in the parties' contract would not be applicable to the arbitrator's decision had it been called to his attention.

The General Counsel also asserts that because the arbitrator did not consider any facts related to decisional bargaining such as notice and opportunity to bargain over the decision, the method and manner of the announcement of the decision, or analyze whether CNA had clearly and unmistakably waived its right to bargain over the decision, the decision is not susceptible of an interpretation consistent with the Act. The arbitrator did not need to reach these issues, however, because he found there was no transfer of unit work to supervision. Accordingly, it is unnecessary to reach the General Counsel's further argument regarding the arbitrator's failure to consider the unfair labor practice issues of decisional bargaining, notice, and waiver.

CNA asserts that the arbitrator's award is repugnant to the Act because it violates Board law which requires that before a change in the scope of a bargaining unit be implemented, the consent of the union or the Board must be obtained. In this argument, CNA misperceives the arbitrator's holding. He specifically stated that the scope of the unit was not compromised by the fact that a position set forth in the unit was not filled. "The job classification of Charge Nurse does not disappear from the Agreement . . . by the Employer's action. Rather, the Employer determined to no longer fill it, as was its right." (Arbitrator's Award at p. 14)

Finally, the General Counsel asserts that the award is not susceptible of an interpretation consistent with the Act because it ignores testimony that Department Supervisors are performing duties previously considered Charge Nurse bargaining unit duties; ignored the fact that when Respondent made the announcement regarding 52 Charge Nurse positions being eliminated, it had already created a Department Supervisor job description and posted the job position on line; and ignored the fact that the job description for Department Supervisor includes many of the same exact duties as those performed by former Charge Nurses. No citations to the record are included in these arguments.

Given the arbitrator's finding that the Department Supervisors do not perform bargaining unit work, perhaps the most critical of the General Counsel's arguments is the assertion that the arbitrator ignored evidence that, in fact, Department Supervisors were performing bargaining unit work. Based upon my review of the transcript of testimony at the arbitration proceeding, and reading it in a light most favorable to the General Counsel's argument, it appears that there might

have been conflicting evidence regarding the nature of the duties performed by Department Supervisors and whether any of their duties constituted Charge Nurse duties. The arbitrator was free to credit some of the testimony over that of others. Accordingly, I cannot find that this alone would require a finding that the arbitration award is not susceptible of an interpretation consistent with the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[13]

ORDER

The complaint is dismissed.

Dated, Washington, D.C. November 16, 2015

Mary Miller Cracraft
Administrative Law Judge

[13] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.